IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA

and

THE HONOURABLE MRS.JUSTICE R.BANUMATHI

O.S.A.No.440 of 2001

NEPC India Limited,
(Formerly NEPC Micon Limited),
36, Wallajah Road,
Chennai-600 002. ... Appellant/Respondent.

vs.

Atlantic Bridge Aviation Limited,
Lydd Airport,
Kent TN 29 9QL, United Kingdom. ... Respondent/Petitioner.

Appeal under Section 483 of the Companies Act, 1956 against the order of the learned Single Judge, dated 21.12.2001, made in Company Petition No.186 of 1997.

For Appellant : Mr.T.R.Rajagopalan,
Senior Counsel for
Ms.K.Bhanumathi

For Respondent : Ms.Chitra Narayanan

JUDGMENT

P.K. MISRA, J

The above appeal is filed against the order dated 21.12.2001 passed in Company Petition No.186/1997, wherein the learned Single Judge has admitted the company petition filed under Section 439 read with Sections 433(e) and 434 of the Companies Act, 1956 for winding up of the present appellant company and directing the advertisement of such petition. The present respondent had filed such company petition.

2.The appellant company was initially incorporated as a Private Limited Company, which was subsequently converted to a Public Limited Company. The present respondent (the petitioner in the company petition) is an international firm of Aviation Consultants. The appellant company, with a view to start business relating to Aviation,

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had engaged the present respondent as Consultants since 1992. For the purpose of convenience, the respondent, who had filed the company petition for winding-up, is referred to as "the petitioner" and the present appellant is referred to as "the Company".

3.According to the case of the petitioner, the services of the petitioner were availed by the Company as consultants. The terms reflected in the correspondence between the two were accepted as apparent from the confirmation letter dated 3rd May, 1993. The rate of consultancy fees had been fixed as per the letter of the Company dated 12th April, 1993 and the reply of the petitioner dated 13th April, 1993. The services of the petitioner were also engaged by the Company to negotiate with AFT and United Airlines as per the terms reflected in the Letter of Engagement dated 17th January, 1997.

4.The amount payable to the petitioner on account of the on going consultancy services rendered by the petitioner and the amount payable relating to the other transaction had remained unpaid for a long period. Accordingly, the petitioner raised two Invoices, bearing Nos.ABA-100324 and ABA-100325, both dated 18.04.1997, for US$ 1,57,959 and 1,11,200 respectively, in all 2,69,159 US Dollars. Invoice No.ABA-100324 was raised by way of fees for on going consultancy services and invoice No.ABA-100325 was raised in connection with negotiations by the petitioner on behalf of the company with AFT and United Airlines.

5.Such amount having remained unpaid, statutory notice dated 25th April, 1997, as envisaged under Section 434 of the Companies Act, 1956 was issued calling upon the Company to pay 2,69,159 US Dollars. Inspite of such notice, no amount was paid by the Company. The petitioner issued a further reminder on 26th May, 1997 and subsequently, since the amount has remained unpaid, the petitioner has filed the company petition for winding-up of the company on the allegation that the Company has failed to repay its debts to the petitioner.

6.The Company in its counter has highlighted that the Company is erecting, installing and commissioning Wind Turbine Generators and similarly it was also running private Airlines and therefore appointment of the Official Liquidator as the Provisional Liquidator would spoil and cripple the entire business of the Company. It has been indicated in the counter that it is a running Company , owning assets and earning profits and therefore the Company petition is not maintainable. The Company denied the allegation regarding indebtedness by stating

> "10. ... The Respondent states that no amount is due towards professional services as alleged. In asmuch as the Petitioner has not rendered any services muchless the professional services as falsely claimed and the Respondent has not agreed to pay any amount to the Petitioner, the Petitioner is not entitled to claim any amount from the petitioner (sick)"

It has been further stated that the Company had sent an interim reply to the Notice dated 25th April, 1997 denying all the allegations. However,

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the fact that the petitioner was engaged as an Air Travel Consultant through the letter of confirmation dated 3rd May, 1993 has been admitted. Nevertheless, it has been stated:

> "12. ... it is false to allege that the consultancy fees was finalised by the parties as set out in the Respondent letter dated 12.04.1993 and the Petitioner's reply dated 13.04.1993. ..."

It has been further stated:

> "12 ... The Respondent states tht while it is true that the services of the Petitioner were engaged by the Respondent to negotiate on their behalf with Aircraft Financing and Trading BV and United Airlines, by their letter dated 17.01.1997. The Respondent had made it very clear that they would pay a sum of US $ 10,000 whether the deal is successful or not and pay additional performance payment of US $ 50000 per aircraft if the deal is successful. The Respondent states that the Petitioner failed to settle disputes that arose between the Respondent and the Air Financing & Trading BV and United Airlines. Both Air Financing & Trading BV and United Airlines have filed proceedings in this Hon'ble Court. The Respondent states that inasmuch as the Petitioner had not made any attempts to settle the issues between the Respondent and Air Financing & Trading BV and United Airlines and the deal was not successful, there is no question of the Petitioner claiming any amounts from the Respondent. Hence the allegation that based on the on-going consultancy services arrangement and based on the letter of engagement dated 17.01.1997 and as per the fees agreed to be paid by the Respondent company to the Petitioner, on two invoices dated 18.04.1997 that were raised by the Petitioner remained unpaid though payment was due and payable within 7 days of the invoice is absolutely false, incorrect and unsustainable. Hence no useful purpose will be served by referring to the said invoices and the letter. The Respondent denies the allegation that the invoices were accepted by the Respondent without any demur or protest."

7.Regarding the Invoices, it has been stated:

> "13..... The Respondent's letter dated 06.12.1996 merely called for details and the Petitioner's reply dated 07.12.1996 is absolutely irrelevant and does not answer the Respondent's request vide letter dated 06.12.1996. Under no stretch of imagination, it can be stated that the Respondent has agreed for payment by their letters. While this is so, the invoice raised on 18.04.1994 (sick) (Invoice No.ABA 100324) referring the letter dated 6/7th December 1996, is absolutely incorrect."

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Regarding Invoice ABA No.100325, it has been stated that the transactions relating to Air Financing and Trade BV and United Airlines had not been served through the petitioner and therefore the petitioner cannot claim any payment from the Company and is not entitled to raise the invoice.

8.The learned Single Judge, posed the question to be considered as follows:

> "whether the petitioner has made out a prima facie case that the respondent is unable to pay its debts and whether the company petition deserves to be admitted and proceeded further, by ordering publication?"

9.Ultimately, the learned Single Judge held that prima facie the Company had failed to clear the dues of the petitioner and the petitioner had made out a prima facie case and therefore the Company Petition should be admitted and advertisement should be made. Such order has been challenged by the Company in the present appeal.

10.Learned counsel for the appellant has contended that a petition for winding-up by a creditor can be entertained and admitted and advertisement can be issued only if there is prima facie case to come to the conclusion that there is a debt due from the Company to the creditor and the Company neglects to clear such debt and where there is a bona fide dispute relating to the liability of the Company itself, such proceedings should not be initiated only with a view to recover the money claimed by the creditor. It has been submitted by him, in the present case, the Company had raised bona fide dispute regarding the amount claimed by the petitioner and therefore the learned Single Judge was not justified in admitting the company petition and directing publication of the advertisement.

11.The learned counsel appearing for the respondent has submitted that the materials on record clearly indicate that the Company had failed to pay the dues of the petitioner, inspite of several opportunities and, therefore, the learned Single Judge was justified in admitting the company petition and directing publication of advertisement. He had further stated that even during the pendency of the appeal, the Company had failed to pay the amount inspite of the direction of the appellate court, which would only indicate that the Company has neglected to pay its debt.

12.Counsels for both parties have referred to several decisions of the Supreme Court, Madras High Court and other High Courts. It is necessary to notice some of them before entering upon a discussion regarding the contentions raised by the parties on merit.

13.The decision reported in AIR 1971 SC 2600 - M.Gordhandas & Co. v. M.W.Industries is a decision relied upon not only by the counsel for both the parties, but also by the Supreme Court and several

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High Courts and it is, therefore, appropriate to refer to such decision first. Such appeal was against a Division Bench decision of Bombay High Court confirming the order of the Single Judge refusing to wind-up the respondent Company therein. Even though the said decision was against a matter finally deciding the winding-up petition, some of the observations made are equally important for considering the question where a company petition for winding -up on the allegation of failure of the Company to pay the debt are relevant and extracted here under.

> "20. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (see London and Paris Banking Corporation, (1874) 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Norfolk Hotel Co. Ltd., (1865) 35 Beav. 204).
>
> 21. Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt by the company chooses not to pay that particular debt (See Re. A Company 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd., 1962 Ch.406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."
>
> (Emphasis added)

14. Learned counsel appearing for the appellant has also placed reliance upon the decisions of the Supreme Court in (1965) 35 COMPANY CASES 456 (AMALGAMATED COMMERCIAL TRADERS (P.) LTD. v. A.C.K. KRISHNASWAMI AND ANOTHER) and (1994)3 SCC 348 (PRADESHIYA INDUSTRIAL & INVESTMENT CORPORATION OF U.P., v. NORTH INDIA PETROCHEMICALS LTD. AND ANOTHER) in support of his contention that where there is a bonafide dispute relating to debts, recourse to winding up proceedings may be inappropriate. The decision of the Supreme Court in (1965) 35 COMPANY CASES 456 (supra) was relied upon in the subsequent decision of the Supreme Court in AIR 1971 SC 2600 (M/s. MADHUSUDAN GORDHANDAS & CO. v. MADHU WOOLEN INDUSTRIES PRIVATE LTD.,). The subsequent decision of the Supreme Court in (1994) 3 SCC 348 (supra) is based on the observations

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made in AIR 1971 SC 2600. It is therefore not necessary to extract in extenso from the aforesaid two decisions.

15.The learned counsel for the appellant has concentrated very much upon the fact that the appellant Company has raised bona fide dispute regarding the payability of the amount claimed by the petitioner and therefore the company petition should not have been admitted. It has been submitted by him that it cannot be said that the defence raised by the appellant Company is mere moonshine and not bona fide one. It has been further submitted that the learned Single Judge has not based the conclusion on relevant materials.

16.A perusal of the pleadings, the documents on record as well as the order passed by the learned Single Judge makes it ample clear that the petition is based on two invoices, both dated 18.04.1997, one for 1,57,959 US Dollars and the other for 1,11,200 US Dollars. We are first concentrating on Invoice No.ABA 100324, dated 18.04.1989. It is not at all denied by the appellant Company that they had engaged the petitioner as their consultants. The petitioner has specifically indicated that the terms of engagement are apparent from the Company's Letter dated 12th April, 1993 and the petitioner's reply dated 13.04.1993 and the engagement of the petitioner as consultant was completed as per letter dated 3rd May 1993. In the counter filed by the Company, a general assertion seems to have been made that the terms of engagement had not been settled. But, the company has accepted that in fact the petitioner was engaged as consultant. The specific assertion of the petitioner is that the terms are apparent from the letter dated 12th April, 1993 and the reply of the petitioner dated 13th April, 1993. The company has not come out with any other correspondence to indicate that the terms were not as reflected in the said earlier correspondence; nor it has denied about the letter of engagement dated 3rd May, 1993.

17.In the above background, it may be necessary to refer to such undisputed materials. In the letter dated 12th April, 1993, which was admittedly written by the Company to the petitioner, it has been stated:

> "... Regarding second stage you charges mentioned seems to be on very much higher side. You have estimated a total amount of 1,47,000 US dollars. Kindly give us some consideration because our co-operation should not stop with this. We want to have long term relation with you. Moreover once you are in India, you can have many other opportunities also.
>
> Keeping all these factors in mind, please give your best offer for second stage immediately so that we can go ahead in full swing. ..."

It is also admitted that the petitioner replied by letter dated 13th

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April, 1993. The relevant portion is as follows:

> "Fees and Expenses:
>
> Consulting fees will be at a rate of either:
>
> a)$740/day for Jonathan M Gordon; or
>
> b)$3,135/week for ABC Consultants on the basis of 6 days on, one day off.
>
> Expenses whilst away from UK base on NEPC business
>
> a)Hotel accommodation in five star.
>
> b)All subsistence.
>
> c)Air travel.
>
> d)Air travel.
>
> d)All out-of pocket expenses whilst away from UK base on NEPC business.
>
> e)Professional disbursements as deemed necessary.
>
> Payment terms
>
> A $20,000 retainer (u-front payment-deposit) would be required. Invoices would then be presented monthly in arrears for all fees and expenses payment required within 7 days of invoice. As involvement diminishes the retainer would be reduced and then eventually eliminated.
>
> Upon receipt of the retainer payment we will commence work as soon as practical. If you need a proforma invoice for the $20K then let me know immediately. ..."

Thereafter, admittedly the Company wrote the letter dated 3rd May, 1993 which is to the following effect.

> "We are pleased to appoint you as our Consultant for Air Taxi project as we have decided to go in for Air Taxi operations after going through the first stage of the consultancy report."

18.As already indicated, it is not the case of the Company, not even a whisper, that after the correspondence dated 12th April, 1993 and 13th April, 1993, there was any other correspondence contrary to the terms offered in the letter dated 13th April, 1993 and similarly it is not the case of the Company that the letter dated 3rd May, 1993, appointing the petitioner as Consultant, was on the basis of any other contract or arrangement.

19.Even though the company is not challenging the fact that the petitioner was engaged as their consultant, in the counter and in the course of argument before the learned Single Judge as well as before us, it has been submitted that there is nothing to indicate regarding the actual amount payable to the petitioner on account of consultancy services rendered by the petitioner. Even the appellant company has gone to the extent of saying that there was no consultancy service rendered and the advice given by the petitioner was not appropriate. In the face of the materials on record, it can be only perceived that the Company has raised the so-called dispute, but there is no prima-facie

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material in support of such so-called dispute. In this connection, we have to refer to the letter dated 6th December, 1996, which was again admittedly written by the Company. The relevant portion is to the following effect.

> "We would request you to kindly send a summary of the Statement of account for all the Bills that are pending for you from January to October '96.
>
> Please send the charges as follows:-
>
> 01.Consultation Charges
>
> 02.Paid out Charges
>
> 03.Any other Charges
>
> Whatever is the break-up of the Bill, please send it immediately."

20.It is also again an admitted fact that in reply to such letter, the petitioner replied vide letter dated 7th December, 1996. The relevant portion of the letter is to the following effect.

> "As you requested For comparison I have also shown 1995 consultancy and expenses to reflect the reduction this year, particularly after our talk in August.
>
> With all inputs considered your account is currently $289,912 in debt.
>
> My bank over draft is currently L148,300 overdrawn which is US$ equivalent $244,695. The situation is dire."

It is also to be noticed that along with such letter, the break-up had been given.

21.At this stage, it is appropriate to recollect that as per the letter dated 13th April, 1993, which was the offer of the petitioner and apparently accepted by the appellant on 3rd May, 1993, it had been indicated that Invoices would be presented monthly in arrears for all fees and expenses and payment should be made within seven days of invoice. Even though it is being argued in the course of hearing of appeal that mere raising of invoices would not indicate existence of debt or payment of amount, it must be noticed that there is no whisper anywhere that the Company had uttered or raised any protest regarding the claim made by the petitioner. Even subsequently, when a specific notice was served, no specific reply was given, even though the contents of the notice have been denied, rather in vague terms.

22.Subsequently, at the time of discussing about the transactions relating to AFT and United Airlines, in the letter of the petitioner dated 17th January, 1997 it was indicated that the outstanding to the petitioner was approximately 1,48,000 US Dollars. The petitioner had indicated the appellant Company to pay 50,000 US Dollars or more of the said money. While accepting about the terms and conditions in the matters relating to AFT and United Airlines and agreeing to pay 10000 US$ as such and 50,000 US$ as additional performance payment, there was no caveat or no protest regarding the claim of the petitioner that approximately 1,48,000 US Dollars was due on that date. On 20th January,

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1997 the petitioner, while confirming about the transactions relating to AFT & United Airlines, had reiterated about the request made by the petitioner regarding payment of 50,000 US$ of the amount outstanding on the account before commencement of the work on the new assignment. Subsequently, by letter dated 3rd February, 1997, the Company authorised the petitioner to negotiate and work out suitable proposal on the pending issues relating to United. In such matter also, there is no demur regarding the outstanding amount payable to the early consultancy service.

23.Keeping in view the above aspects, the specious plea raised in the counter, even to the extent of denying about any consultancy service rendered, sounds hollow to say the least. It may be that, mere raising of an invoice or mere statement that certain amount is due may not be sufficient in ordinary course to come to even a prima facie conclusion that such amount is due. However, in the present context, when the un-rebutted correspondence indicate that the petitioner had been engaged as consultant and had indicated about the outstanding on the basis of the query made by the appellant company itself, in the absence of any contemporaneous correspondence explaining the situation and even in the absence of any subsequent correspondence explaining such transactions, the bald denial contained in the written statement cannot be considered as raising a bona fide dispute regarding payability of the amount to the petitioner.

24.The learned counsel for the appellant has harped upon on the fact that there is some discrepancies in the letter dated 7th December, 1996 as compared to the subsequent invoices, which have not been explained. However, as observed by the Supreme Court in the decision reported in AIR 1971 SC 2600, if the dispute is relating to the exact amount payable, still it can be said that there is a debt outstanding. The learned counsel for the appellant has placed reliance upon subsequent decision of the Supreme Court in 1994 (3) SCC 348 – Pradeshiya Industrial & Investment Corpn. of U.P. v. North India Petrochemicals Ltd. and contended that the term "debts" means that an ascertained sum payable. The petitioner has quantified the amount which is payable. The claim is not relating to any un-liquidated damages. The admitted correspondence clearly indicate that for the consultancy service rendered from January to October 1996 the amount was outstanding. The petitioner was repeatedly asking about the payment of such amount but the appellant company has maintained a sphinx like silence. In such a background, the ratio of the subsequent decision of the Supreme Court relied upon by the appellant company is not applicable to the peculiar facts of the present case.

25.The learned counsel for the appellant has also pointed out that so far as the invoice ABA 100325 is concerned, the claim was misconceived. In the above context, the counsel for the appellant has referred to the letter written by the petitioner on 21st April, 1997 and has pointed out that the letter of the petitioner clearly indicates that the dispute relating to the two Aircraft in question relating to United had been settled not through the negotiations made by the petitioner but

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otherwise and therefore there was no justification for the petitioner to claim 1,11,200 Dollars on that score. To the above extent, the counsel for the appellant is justified inasmuch as the said letter of the petitioner had indicated :

> "... During this visit you agreed with all charges to date and agreed with the terms of the amicable settlement thus the requirements as far as ADA are concerned were complete on two aircraft. Subsequently, at your own volition, you reneged on the agreement due to other pressures and chose to renegotiate an alternative settlement with UAL. ..." (Emphasis added)

26.The above correspondence made by the petitioner indicates that the dispute relating to two aircraft with United Airlines had been settled on the basis of renegotiations made by the Company. Therefore, it is a genuine dispute as to whether the petitioner can claim payment of 1,00,000 Dollars on that score. However, even excluding the aforesaid aspect, the fact remains that irrespective of the question of success in such negotiation, the petitioner was entitled to receive 10,000 Dollars, which amount had admittedly not been paid even after the issuance of notice. In other words, relating to invoice ABA-100325, atleast there was no dispute regarding payability of 10000 dollars which had remained unpaid. In respect of Invoice No.ABA 100324, the amount payable towards consultancy fees and other admissible expenses had remained outstanding. May be, there was some dispute relating to the actual amount payable. However, the fact remains that inspite of several correspondence and subsequent issuance of statutory notice, the appellant Company had not cleared the debt.

27.The learned counsel for the appellant had submitted that the appellant Company is an ongoing company and is a leader relating to establishment of electrical generating companies through windmills and it has employed several thousands persons and therefore it is not proper to liquidate such an ongoing company. At the present stage, we are only concerned with the question as to whether the learned Single Judge was right in admitting the company petition and directing issuance of advertisement. The order itself does not amount to a direction regarding liquidation. It is only initial, albeit an important step. At the stage of considering these aspects, obviously, the Court is only required to come to a prima facie conclusion regarding the existence of debt and neglect on the part of the Company to pay such amount inspite of statutory notice. It is no doubt true that by publication of the advertisement the company's reputation is likely to be tarnished and, therefore, the Company Court requires existence of a strong enough prima facie case for initiating such proceedings.

28.In the peculiar facts and circumstances of the present case, we find that the learned Single Judge, after taking into account the relevant facts and circumstances, has admitted the company petition and has directed for issuance of advertisement. Such order is essentially discretionary in nature and in the absence of strong enough reason, we are not inclined to differ from such conclusion. However, we

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feel, interest of justice would be served, while upholding the order of the learned Single Judge, by directing that the advertisement may be published after 90 days.

29. In the result, the appeal is dismissed, subject to the above observations and directions.

Gb/dpk

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

1. The Sub-Asst. Registrar, Original Side, High Court, Madras

+ 1 CC To Ms.K.Bhanumathi, Advocate SR NO.59527

+ 1 CC To Mrs.Chitra Narayanan, Advocate SR NO.59513

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